APPENDIX D

FEDERAL CASES

D.C. Circuit

Alicke v. MCI Communications Corporation, No. 96-0517 (TPJ), U.S.D.C., D.D.C. [landline long distance]

First Circuit

Casper v. Southwestern Bell Mobile Systems, No. 1:95cv12712, U.S.D.C., D. Mass. [wireless]

Smilow v. Southwestern Bell Mobile Systems, No. 1:97-cv-10307-REK, U.S.D.C., D. Mass. [wireless]

Second Circuit

Birnbaum v. Sprint Communications Company, L.P., No. 96-CV-2514, U.S.D.C., E.D.N.Y. [landline long distance]

Marcus v. AT&T Corp., No. 96-9244, U.S.D.C., S.D.N.Y. [landline long distance]

Moss v. AT&T Corp., No. 96-9256, U.S.D.C., S.D.N.Y. [landline long distance]

Third Circuit

Opalka v. AWACS, Inc., d/b/a Comcast Metrophone (In re Comcast), No. 2:96-cv-02418, U.S.D.C., E.D. Pa. [wireless]

Fifth Circuit

Esquivel v. *Southwestern Bell Mobile Sys.*, No. 95-99, U.S.D.C., S.D. Tex. [wireless]

Pepper v. BellSouth Corporation, No. 3:95-CV-851LN, U.S.D.C., S.D. Miss. [wireless]

Simons v. GTE Mobilnet, Inc., No. H-95-5169; U.S.D.C., S.D. Tex. [wireless]

Seventh Circuit

Cahnmann v. Sprint Corporation, No. 96 C 5129, U.S.D.C., N.D. Ill. [landline long distance]

Ninth Circuit

Smith v. Sprint Communications Co., L.P., No. C96-2067-FMS, U.S.D.C., N.D. Cal. [wireless]

Eleventh Circuit

Brunson v. AT&T Corp., No. 1:96cv01010, U.S.D.C., S.D. Ala. [wireless]

Goforth v. Cellular One, Inc., No. 98-289-CIV-FTM-24D, U.S.D.C., M.D. Fla. [wireless]

Haughton v. Sprint International Communications Co., No. 7:96cv00230, U.S.D.C., N.D. Ala. [wireless]

Ponder v. GTE Mobilnet, No. CV-95-1046-JH, U.S.D.C., S.D. Ala. [wireless]

White v. GTE Mobilnet, Inc., No. 8:97cv01859, U.S.D.C., M.D. Fla. [wireless]

STATE CASES

District of Columbia

Bootel v. MCI Telecommunications Corp., No. 95-8270, Superior Ct. of the District of Columbia [landline long distance]

Alabama

Bennett v. Alltel, No. 96-D-232, Circuit Court of Montgomery County [wireless]

Lee v. Contel Cellular of the South, Inc., No. CV-95-004367, Circuit Court of Mobile County [wireless]

Mann v. Cellular One, No. CV-95-8579, Circuit Court of Jefferson County [wireless]

Moulton v. Alltel, No. 96-D-89-N, Circuit Court of Montgomery County [wireless]

Mobley v. AT&T Corp., No. 25895, Alabama Public Service Commission [landline long distance]

Arkansas

Maddox v. Alltel Mobile Communications of Arkansas, Inc., No. 98-776, Circuit Court of Saline County [wireless]

California

Ball v. GTE Mobilnet of California Limited Partnership, No. 98AS03811, California Superior Court, Sacramento County [wireless]

California Wireless Resellers Association v. Los Angeles Cellular Telephone Company, No. 98-06-055, California Public Utilities Commission [wireless]

Cohen v. AirTouch Cellular Inc. Los Angeles SMSA, No. 972438, California Superior Court, San Francisco County [wireless]

Day v. AT&T Corp., Nos. 976391/976617, California Superior Court, San Francisco County [wireless]

Hagen v. America Online, Inc, No. 971047, California Superior Court, San Francisco County [internet]

Landin v. Los Angeles Cellular Telephone Company, No. BC143305, California Sup. Ct., Los Angeles County [wireless]

Nova Cellular West, Inc. v. AirTouch Cellular of San Diego, No. 98-02-036, Cal. Public Util. Comm'n [wireless]

Powers v. AirTouch Cellular, No. N71816, California Superior Court, North County Branch of San Diego [wireless]

Ross v. Pacific Bell, No. 974081, California Superior Court, San Francisco County [landline long distance]

Delaware

First M. Corp. v. America Online, Inc., No. 14476, Court of Chancery, New Castle [internet]

Sanderson v. AWACS, Inc., d/b/a Comcast Metrophone, No. 96C-02-225, Del. Sup. Ct., New Castle County [wireless]

Florida

Goforth v. Cellular One, Inc., No. 98-3623 CA-RWP, Circuit Court of the 20th Judicial District, Lee County [wireless]

Georgia

Griffin v. AirTouch Cellular of Georgia, No. E55480 Q19/140, Superior Court of Georgia, Fulton County [wireless]

Saba v. AirTouch Cellular of Georgia, No. E56074, Superior Court of Georgia, Fulton County [wireless]

Sharple v. AirTouch Cellular of Georgia, No. E55480, Superior Court of Georgia, Fulton County [wireless]

Smith v. AirTouch Cellular of Georgia, No. E56092, Superior Court of Georgia, Fulton County [wireless]

Illinois

Penrod v. Southwestern Bell Mobile Sys., Inc., No. 96-L-132, Circuit Ct., Third Jud. Dist., Madison County [wireless]

Indiana

Rogers v. Westel-Indianapolis Company, d/b/a Cellular One, No. 49D03-9602-CP-0295, Marion Superior Court [wireless]

Missouri

Halper v. Sprint, No. CV95-22815, Circuit Court of Jackson County, Missouri and Kansas City [wireless]

New Jersey

Carroll v. Bell Atlantic (In re Cellco Consumer Litigation), No. AM-001316-96T3, New Jersey Superior Court, Camden County [wireless]

DeCastro v. AWACS, No. L-1715-96, New Jersey Superior Court, Camden County [wireless]

Kathuria v. Comcast Cellular One, No. L-5079-95, New Jersey Superior Court, Middlesex County [wireless]

Kuhn v. Bell Atlantic (In re Cellco Consumer Litigation), No. AM-001303-96T3, New Jersey Superior Court, Camden County [wireless]

Weinberg v. Sprint Corporation, No. BER-L-12073-95, New Jersey Superior Court, Bergen County [landline long distance]

New York

Porr v. NYNEX Corporation, No. 96-526, Supreme Court of the State of New York, Westchester County [wireless]

Roman v. Bell Atlantic NYNEX, No. 604150/96, Supreme Court of the State of New York, New York County [wireless]

Tolchin v. Bell Atlantic, No. 17136/97, Supreme Court of the State of New York, Kings County [wireless]

North Carolina

Mandell v. Bell Atlantic NYNEX Mobile, No. 97-CV5-6528, North Carolina Sup. Ct., Mecklenburg County [wireless]

Ohio

Kuns v. 360° Communications Co., No. 96-CV-196, Court of Common Pleas, Erie County, Sandusky [wireless]

Pennsylvania

Pennsylvania Bancshares v. Motorola, Inc., No. 95-19136, Court of Common Pleas, Montgomery County [wireless]

Tennessee

Hagy v. Sprint Cellular, No. 6348, Chancery Court for Washington County [wireless]

Texas

Purkey v. GTE, District Court of Jasper County [wireless]

Sommerman v. Dallas SMSA Limited Partnership, No. 96-02150, District Court of Dallas County [wireless]

Winston v. GTE Communication Sys. Corp., No. 95-58377, District Court of Harris County [wireless]

Washington

Hardy v. Claircom Communications Group, Inc., No. 96-2-00574-6, King County Superior Court [airplane telephone]

Lair v. GTE Airfone, No. 96-2-00575-4, King County Superior Court [airplane telephone]

Lair v. US West New Vector, No. 95-2-26309-7 SEA, King County Superior Court [wireless]

Tenore v. AT&T Wireless Services, No. 95-2-27642-3 SEA, King County Superior Court [wireless]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

PATRICK SIMONS, SHEILA FAY, AND JAMIL ELIAS, on behalf of themselves and all others similarly situated in the United States, Plaintiffs, vs. GTE MOBILNET, INC., Defendant	CIVIL ACTION NO. H-95-5169

ORDER OF DISMISSAL

Pending before the Court in the above referenced action, challenging the liquidated damages provision imposing an early termination charge in Defendant GTE Mobilnet, Inc.'s cellular telephone contracts as void because it is an illegal penalty, are Defendant's incorporated Rule 12 motion for judgment on Plaintiffs' first amended original complaint (instrument §29) and

Plaintiffs Patrick Simons, Sheila Fay, and Jamil Elias' unopposed[1] motion for leave to amend (instrument §30).

Defendant moves for dismissal for failure to state a claim under Fed. R. Civ. P. 12(b) or 12(c). Defendant emphasizes that it is not a party to any of the customer service agreements ("CSAs"),[2] containing the disputed early termination clauses, made with any Plaintiffs. Rather the proper defendants, if any, are GTE Mobilnet Service Corporation's affiliates and subsidiaries that are licensed to provide cellular services in Plaintiffs' "primary service areas." Defendant was merely acting as the agent of these principals in entering into the CSAs. Moreover, argues Defendant, Plaintiffs Fay and Elias have not

---

[1] According to the certificate of conference included in the motion, Defendant does not oppose the motion but reserve its right to file a supplemental motion to dismiss based upon new allegations in the Second Amended Original Complaint.

[2] Each Plaintiffs' CSA contains the following clause:

> PARTIES: This Agreement is made by GTE Mobilnet Service Corporation, on behalf of its affiliates and subsidiaries, (GTE) *as agent* or reseller *of the cellular network operator (licensee) licensed by the Federal Communications Commission* to serve Customers' primary service area and the individual or organization (Customer) identified on the front of this Agreement [emphasis added].

Defendant points out that documents attached to a Rule 12 (b) action to dismiss that are indisputably authentic and on which the plaintiff's claims are based may be considered by the court. *Pension Benefit Guaranty Corp. v. White Consolidated Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 687 (1994); *Venturo Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Sheppard v. Texas Dept. of Transp.*, 158 F.R.D. 592, 595-96 (E.D. Tax. 1994).

alleged any actual injury,[3] since they are members of their purported Sub-class A that have paid no fees, and therefore have not raised a case or controversy as required by Article III, Section 2, Clause 1 of the United Stated Constitution. As a result this court lacks subject matter jurisdiction over their claims. *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974); *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). They must also allege damage or actual injury under section 206 of the Communications Act of 1934, 47 U.S.C. sections 151 *et seq.* (the "Federal Communications Act" or "FCA"), and a failure to do so constitutes a fatal pleading defect. Furthermore, Defendant asserts that Plaintiff Fay and Elias are not adequate class representatives because Rule 23(b)(3) requires putative class members to have suffered actual damages. Finally, regarding Plaintiffs' complaint that Defendant's practices are "punitive" under section 206 and therefore "unreasonable" under section 201(b) because they violated the Texas common law of the liquidated damages, Defendant characterizes it as an improper "attempt to usurp Congress's intent to preempt state law under the FCA, and thereby effectively 'nationalize' Texas common law through this purported nationwide class action." Defendant's Incorporated Rule 12 Motion as 3. Plaintiffs' effort to "shoehorn" the Texas common law of liquidated damages into the FCA and use the FCA to nationalize Texas common law is improper. *Franchise Tax Bd. v. Construction Laborers Vac. Trust*, 463 U.S. 1, 23-24 (1983) (*citing Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)) ("if a federal cause of action completely preempts a state cause of

---

[3] Plaintiffs assert that they satisfy requirements under Fed. R. Civ. P. 23(b)(3) for two sub-classes: (1) Sub-class A for customers who have not paid an early termination fee and (2) Sub-class B for those who have paid within four years prior to July 13, 1995. Defendant maintains that members of Sub-class A, which includes Plaintiffs Fay and Elias, have not been damaged because they have not paid any early termination fee.

action any complaint that comes within the scope of the federal cause of action necessarily arises under the federal law"). Defendant emphasizes that there is no evidence of any congressional intent to incorporate the Texas common law of liquidated damages into the FCA. Furthermore Plaintiffs' effort to do so conflicts with the standard of the reasonableness governing the conduct of the common carriers in section 201(b), and allowing state law to interfere with the FCA's regulatory scheme is improper. *Cellular Dynamics, Inc. v. MCI Telecommunications Corp.*, No. 94 C 3126, 1995 WL 221758 (N.D. Ill., April 12, 1995). Cellular carriers' rates and practices are governed exclusively by section 201(B), and Congress has expressly and completely preempted the entire field of rate regulation under section 332(C)(3)(a), making Texas common law irrelevant.

Plaintiffs respond conclusorily that Defendant is a party to the CSAs with the named Plaintiffs and that their First Amended Original Complaint alleges facts sufficient to show that the termination fee provision in those contracts constitutes an unreasonable practice under the FCA. They read the "PARTIES" provision in the CSAs as demonstrating that customers are contracting with the cellular network operator licensed by the Federal Communications Commission, which they assert "upon [unidentified] information and belief" is the Defendant. Even if the Defendant is not the cellular network operator, Plaintiffs argue that there is nothing in the CSAs to evidence that fact and that Defendant's contention that it is not is insufficient to controvert their allegations. They also point to Defendant's registered trademark printed at the top of the front page of each CSA. As for a justiciable controversy, Plaintiffs state that they have deleted their claim for declaratory relief from their proposed Second Amended Original Complaint, attached to their unopposed motion for leave to amend.

Plaintiffs motion for leave to amend indicated that the Second Amended Original Complaint deletes the requests for certification of a national class and requests only certification of a Texas class of individuals similarly situated with the named plaintiff class representatives.

This Court agrees with Defendant that the "PARTIES" provision indicates that it acted as an agent for its affiliates and subsidiaries and that it is not a licensed cellular network operator for purposes of the CSAs. Therefore it is not a proper defendant here. Furthermore because Plaintiffs Elias and Fay have not paid an early termination fee, all their claims, not just their claim for declaratory judgment, must be dismissed for lack of subject matter jurisdiction because they have suffered no injury, have no justiciable controversy, and lack standing to pursue this suit. In addition, regardless of whether the proposed class is nationwide or only Texas-wide, all state law claims related to the field of rate regulation are completely preempted by section 332(c)(3)(A) of the FCA and Texas law as a standard for unreasonable practices is irrelevant. Moreover Plaintiffs' proposed amendment will not save these fatal pleading defects.

Accordingly, the Court

ORDERS that Plaintiffs' motion for leave to amend is DENIED because amendment is futile and that Defendant's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12 is GRANTED.

SIGNED at Houston, Texas, this 11th day of April, 1996.

/s/

MELINDA HARMON

UNITED STATES DISTRICT JUDGE

APPENDIX F

TENTATIVE RULINGS
Department 53
Sacramento Superior & Municipal Courts
800 H Street
JOHN R. LEWIS, JUDGE
S. SLOCUMB, Clerk
T. MULLENIX, Bailiff
November 17, 1998, 09:00

• • • •

ITEM 9 98AS03811 SUSANNE BALL, ET AL V. GTE MOBILNET OF CA LTD, ET AL

* JNP * Nature of Proceeding: DEMURRER
Filed by: POULOS, JOHN S.

The joinders are granted. The demurrers of all demurring defendants are SUSTAINED without leave to amend on the ground the Federal Communications Act preempts all state regulatory authority over wireless service rates. Plaintiffs are not without a remedy; they may seek a remedy before the FCC or in federal court.

Plaintiffs seek injunctive relief and damages for various practices of the defendants which plaintiffs allege are violative of Business and Professions Code section 17200. These practices are (1) "rounding up" in which a full minute is charged for a part of a minute used, (2) "send to end" which includes charging for nonconversation time, (3) charging for ringing time for complete calls but not for incomplete calls, (4) charging full rates for incomplete calls, and (5) charging for "lag time." Plaintiffs assert that their challenges are not about rates; rather, they relate to billing practices and nondisclosure of such practices. The argument is interesting, but the court is not persuaded by it. The cases relied upon by Plaintiffs are readily

distinguishable. The reasoning of the Federal District Court in the case of In re Comacast [sic] Cellular Telecommunications Litigation, a case which is legally and factually very similar to this one, is here apposite. The plaintiffs in Comcast also attacked the fairness of charges for noncommunication time. The court considered this to be more than just a challenge to billing practices (not necessarily preempted) and noted that plaintiffs were attacking the "reasonableness of the method by which Comast calculates length and consequently the cost of a cellular telephone call. As such, the plaintiff" [sic] claims present a direct challenge to the calculation of the rates charged by Comcast . . . ." The court went on to state "While none of these claims pose an explicit challenge to the rates charged by Comcast for cellular phone service, a careful reading of the complaint and the remedies sought by the plaintiffs demonstrates that the true gravamen of the complaint is a challenge to Conmcast's [sic] rates and billing practices."

Plaintiffs' exploring of a distinction between intrastate and interstate service providers offers no meaningful support to Plaintiff's position. Such a distinction has no relevance to the issue of preemption here. Neither does the Court find persuasive on the issue of preemption Plaintiffs' commentary regarding the "filed rate" doctrine.

This minute order is effective immediately. No formal order pursuant to Rule 391 or further notice of this order is required.

APPENDIX G

STATE OF INDIANA)) SS: COUNTY OF MARION)	IN THE MARION SUPERIOR COURT CIVIL DIVISION, ROOM THREE CAUSE NO. 49D03-9602-CP-0295

JOHN M. ROGERS, on behalf of himself and all other similarly-situated parties,

Plaintiff,

vs.

WESTEL-INDIANAPOLIS COMPANY d/b/a CELLULAR ONE,

Defendant.

ORDER

Oral argument by attorneys Mark Rutherford for the Plaintiff and Richard Beckler, Larry Wallace, and Michael Goggin for Defendant, was heard on June 12, 1996. The Court having considered the oral argument and having reviewed the pleadings, briefs, supplemental authorities and responses thereto, now FINDS and ORDERS:

1. Westel's Motion to Stay Portions of Its Motion to Dismiss the Complaint, filed May 17, 1996, is hereby granted.

2. In deciding Westel's motion to dismiss the complaint, filed February 5, 1996, the Court considered only the issues of whether Mr. Rogers' claims are preempted by federal statute and whether Mr. Rogers' complaint should be dismissed under the doctrine of primary jurisdiction.

3. In deciding Westel's motion to dismiss, the Court did not consider Exhibits B and C of Westal's brief.

4. The remedy requested by Plaintiff will in fact require a change of rates and therefore *this* Court does not have jurisdiction. The Court finds that jurisdiction rests with the Federal Communications Commission and/or the federal court, per federal statute.

THEREFORE, the Defendant's Motion to Dismiss for lack of jurisdiction is granted.

SO ORDERED, ADJUDGED AND DECREED THIS 1 DAY OF JULY 1996.

/s/

Patrick L. McCarty, Judge
Marion Superior Court
Civil Division, Room 3

Distribution:

Mark W. Rutherford
LAUDIG GEORGE RUTHERFORD & SIPES
156 East Market Street, Suite 600
Indianapolis, IN 46204

John M. Rogers
One North Pennsylvania Street
Suite 600
Indianapolis, IN 46204

Larry J. Wallace
Rand D. Richey
PARR RICHEY OBREMSKEY & MORTON
1600 Market Tower
Ten West Market Street
Indianapolis, IN 46204-2970

Richard W. Beckler
Michael C. McGovern
Michael P. Goggin
FULBRIGHT & JAWORSKI, L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004-2604

Naylor Decl. 124

APPENDIX H

Number	Clerk		Reporter	
N71816	KARYN STOKKE		TELEPHONIC P.O. BOX 128, SAN DIEGO, CA 921124104	
Date of Hearing	**Time of Hearing**	**Date Complaint Filed**	**Judge**	**Dept**
10/06/97	02:00 PM	06-25-96	KENNETH O. ZIEBARTH	H
Plaintiff/Petitioner			**Defendant/Respondent**	
DAVID POWERS			AIRTOUCH CELLULAR	
Attorney for Plaintiff/Petitioner			**Attorney for Defendant/Respondent**	
ALEXANDER M. SCHACK			DOUGLAS R. TRIBBLE (1)	

1. DEFENDANT DEMURRER

THIS MATTER HAVING COME BEFORE THE COURT THIS DATE, THE COURT ORDERS:

DEFENDANT'S GENERAL DEMURRER TO THE ENTIRE SECOND AMENDED COMPLAINT BASED ON FEDERAL PRE-EMPTION PURSUANT TO 47 U.S.C. § 332(c)(3)(A) IS SUSTAINED WITHOUT LEAVE TO AMEND. CONGRESS HAS MADE CLEAR IN THIS CODE SECTION ITS INTENT TO PRE-EMPT ALL STATE REGULATION OF RATES CHARGED FOR CELLULAR SERVICE.

DESPITE THE AMENDMENTS TO THE COMPLAINT, PLAINTIFFS' ACTION IS STILL A CHALLENGE TO DEFENDANT'S PURPORTED OVERCHARGES IN

RATES. FOR EXAMPLE, IN PARAGRAPH 18 OF THE THIRD AMENDED COMPLAINT, PLAINTIFF ALLEGES THAT IT HAS BEEN DAMAGED BY DEFENDANTS [SIC] "METHODS OF DETERMINING OR CALCULATING THE QUANTITY OF CHARGEABLE AIRTIME USAGE" WHICH HAS CAUSED PLAINTIFF DAMAGE IN THAT IT HAS HAD "TO PAY FOR LARGER QUANTITIES OF CELLULAR TELEPHONE SERVICE THAN . . . ACTUALLY USED". SIMILAR LANGUAGE IS CONTAINED IN THE REQUEST FOR INJUNCTIVE RELIEF CONTAINED IN MANY CAUSES OF ACTION (SEE PARAGRAPHS 41, 50, 56, 61, AND 71).

THESE ALLEGATIONS DO NOT FOCUS ON DEFENDANT'S ALLEGED FAILURE TO DISCLOSE THE "TEARDOWN TIME" CHARGE, BUT ON THE LEGALITY OR REASONABLENESS OF SUCH CHARGES. PLAINTIFFS [SIC] ALLEGATIONS CONSTITUTE DIRECT CHALLENGES TO THE CALCULATION OF THE RATES CHARGES BY DEFENDANT AIRTOUCH FOR CELLULAR TELEPHONE SERVICE AND THUS, THE ACTION IS EXPRESSLY PREEMPTED. (SEE *IN RE COMCAST CELLULAR TELECOMMUNICATIONS LITIGATION*, 949 F.SUPP. 1193 (E.D. PA. 1996, A COPY OF WHICH IS LODGED AS DEFENDANT'S EXHIBIT E.)

THIS RULING DISPOSES OF THIS MATTER IN ITS ENTIRETY.

DATED: 10/06/97

/s/

JUDGE OF THE SUPERIOR COURT

APPENDIX I

ORDER ON MOTION

LARRY	SUPERIOR COURT OF
CARROLL ETC	NEW JERSEY
V.	APPELLATE DIVISION
CELLCO	DOCKET NO. AM-001316-96T3
PARTNERSHIP	MOTION NO. M-006515-96
	BEFORE PART: K
	JUDGE(S): SHEBELL
	DREIER

MOTION FILED:	JUNE 02, 1997
BY:	CELLCO PARTNERSHIP
ANSWER(S) FILED:	JUNE 19, 1997
BY:	LARRY CARROLL
SUBMITTED TO COURT:	JUNE 23, 1997

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 25TH DAY OF JUNE, 1997, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT -- FOR LEAVE TO APPEAL:

GRANTED	DENIED	OTHER
( )	(X)	(X)

SUPPLEMENTAL: We are satisfied that plaintiffs' action is primarily grounded on allegations of fraud and consumer protection and not rate setting. We expect that the trial judge will recognize the limits of jurisdiction as reserved to the States under the "savings clause" of 47 U.S.C. § 332(c)(3)(A), and that,

therefore, rates will not be directly impacted.

-9435-96

FOR THE COURT:

/s/
THOMAS F. SHEBELL JR, P.J.A.D.

APPENDIX J

Decision 98-09-037 September 3, 1998
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Nova Cellular West, Inc. dba San Diego Wireless, Complainant, vs. AirTouch Cellular of San Diego, Defendant.	Case 98-02-036 (Filed February 13, 1998)

OPINION

Summary

Nova Cellular West, Inc. (Nova), a cellular reseller operating in the San Diego area, complains that AirTouch Cellular (AirTouch) refuses to supply it with four promotional plans at lower rates that would reflect electronic billing efficiencies. AirTouch moves to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

Nature of Complaint

On February 13, 1998, Nova filed this complaint against "AirTouch Cellular of San Diego,"[1] depositing $37,930.70 in disputed billing amounts with the Commission. Nova filed an amended complaint on March 12, 1998, depositing an additional $17,291.74 with the Commission. On June 12, 1998, Nova filed a second amended complaint that increased the amount of

[1] Defendant's name is incorrectly stated in the complaint. AirTouch Cellular (U-3001-C) is the cellular operator in the San Diego market and has submitted an answer and a motion to dismiss.

disputed funds deposited with the Commission to $95,689.39. Nova is a customer of AirTouch's cellular service; Nova purchases AirTouch cellular service in volume and resells that service to the public.

Nova alleges that AirTouch refuses to make four promotional access and airtime plans available to Nova at lower rates that would reflect an electronic billing format. While the service packages are available for resale, Nova alleges that the cost to it is higher because none of the packages includes the billing format that creates administrative cost savings. Nova asks the Commission to enjoin AirTouch from continuing to bill and collect from Nova for charges other than under the noted rate plan or such other more favorable plan, and to remove a total of $95,689.39 that Nova alleges was improperly assessed since November 1997.

AirTouch admits the facts of the complaint. It states that its billing system can, for certain rate plans, generate a billing tape in a format that allows a reseller to economically generate bills for the reseller's customers. AirTouch states that it also offers other rate plans, many of them with short-term promotional discounts, and that AirTouch is not able to develop billing tapes in that same format for these rate plans. AirTouch states that resellers may purchase service under these special rate plans, but that they must accept the terms, conditions and service limitations of these plans, including the number of options for the format of bills or billing tapes.

Procedural History

This case was filed on February 13, 1998. Notice of the filing appeared in the Commission's Daily Calendar on February 26, 1998. On March 2, 1998, defendant was instructed to answer the complaint within 30 days. The instructions, a copy of which was served on complainant, assigned the matter to Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding,, as that term is defined in Rule 5(b) of the Rules of Practice and Procedure. Because we have decided to dismiss the complaint on the basis of defendant's motion to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," *i.e.*, through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

Motion to Dismiss

AirTouch on April 15, 1998, filed a motion to dismiss the complaint. Nova responded to the motion of April 30, 1998. AirTouch moves for dismissal on grounds that (1) this Commission lacks subject matter jurisdiction because the complaint deals with rates charged to a reseller; (2) a similar complaint regarding another AirTouch rate plan was the subject of a 1997 settlement agreement between the parties that purportedly barred subsequent complaints of this nature,[2] and (3) the complaint fails to state a claim upon which relief can be granted. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts. Accordingly, the motion to dismiss for

---

[2] *See* Decision (D.)97-05-100, dismissing with prejudice Nova's complaint in Case 96-12-027. A copy of the parties' settlement agreement in that case is attached to AirTouch's motion to dismiss.

lack of jurisdiction is granted. Because of this decision, we do not reach the other grounds for dismissal.

Discussion

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§151 et seq., as amended, to provide a uniform federal regulatory framework for all commercial mobile radio services.[3] Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

> "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. §332(c)(3)(A).)

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular carriers for an 18-month period. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.[4]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular

---

[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 387-97 (1993).

[4] On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order issued on August 8, 1995.

carriers. As the Commission itself has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[5]

Nova argues that its complaint does not involve rate regulation, but is instead a dispute over a billing practice. It states that, based on an FCC interpretation, the Commission may continue to decide complaints relating to "customer billing information and practices and billing disputes and other consumer matters."[6]

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[7] the Commission does not have authority to enjoin AirTouch from billing and collecting the rates at issue here, which is the remedy sought by Nova. Indeed, Nova asks the Commission to order AirTouch to adjust

---

[5] *Investigation on the Commissions's Own Motion Into Mobile Telephone Service and Wireless Communications*, D.96-12-071, at 23 (December 20, 1996). A number of judicial authorities support this view. *See In re Comcast Cellular Telecom. Litigation* (E.D.Pa. 1996) 949 F.Supp. 1193 ("any state regulation of [a cellular carrier's rate practices] is explicitly preempted under the terms of the Act."); *Lee, et al. v. Contel Cellular of the South* (S.D.Ala. 1996) 1996 U.S.Dist. LEXIS 19636 (state court action preempted as to "rounding" practice in calculating cellular charges).

[6] *In the Matter of the Petition of the People of the State of California and Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates*, FCC 95-195. PR Docket No. 94-105 (May 19, 1995), para. 145.

[7] *See* D.96-12-71, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

its rates to eliminate approximately $96,000 in charges to Nova. These requested actions would involve the Commission in ratemaking for cellular telephone services, an activity in which the Commission has been preempted. Consequently, the complaint must be dismissed.

Comments on Draft Decision

At the direction of Assigned Commissioner Neeper, parties were given the opportunity to comment on the draft decision in this matter. Both complainant and defendant filed comments on August 14, 1998.

Complainant argues that its complaint seeks to require AirTouch to provide it with electronic billing tapes for four promotional rate plans, and that this constitutes a billing dispute, over which this commission has jurisdiction, rather than a dispute as to rates. It notes that the Commission, in discussing federal preemption in D.96-12-071, stated that preemption would not apply to "eligibility for rate plans" and "scope of service within each rate plan." (D.96-12-071, at 14.) Complainant asserts that those are the issues here. It cites the case of *GTE Mobilnet v. New Par, et al.* (6th Cir. 1997) 111 F.3d 469, as standing for the proposition that alleged discriminatory treatment against cellular resellers under state law is not unequivocally preempted by the FCC.

Defendant argues that the complaint asks the Commission to direct AirTouch to offer Nova particular rates, namely the price made available in certain promotional rate plans to which Nova does not subscribe. Further, defendant states, the complaint asks the Commission to return to Nova the amount Nova alleges was unlawfully assessed, in effect changing *post hoc* the rates AirTouch charged to Nova. Defendant asserts that this type of state commission involvement in cellular rate regulation is prohibited by Section 332(c)(3) of the Communications Act. As to Nova's claim that it seeks only mandatory provisioning of a billing format, defendant cites recent dicta of the United States Supreme Court

stating that "[r]ates,...do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates [or for discriminatory rates] can be couched as a claim for inadequate services and vice versa."[8]

We agree with defendant that the relief requested by complainant requires ratesetting and that the Commission lacks jurisdiction to set cellular rates. The Commission, however, does retain authority over other terms and conditions of cellular service. In this case, mandating that AirTouch provide particular services at given rates is functionally identical to requiring AirTouch to provide its given services at particular rates. Both actions would constitute "rate regulation," and neither remedy is permitted under Section 332. The Sixth Circuit's decision in *GTE Mobilnet* is distinguishable, in that the issue there was whether a federal court should abstain from enjoining state commission action on the basis of preemption out of deference to the ability of the commission and state courts to deal with that question. The Sixth Circuit held that federal abstention was appropriate. As to D.96-12-071, the Commission in Conclusion of Law 10 states that it will continue to monitor restrictive practices of cellular carriers as to "nonrate terms and conditions." (D.96-12-071, at 32.) The undisputed facts of this case make clear that the relief is ratemaking, and therefore is preempted. Complainant should seek its relief before the FCC when its complaint involves AirTouch practices that would require a change in rates.

Findings of Fact

1. Complainant alleges that defendant assesses unlawful rates for at least four cellular service packages.

---

[8] *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.* (June 15, 1998) ___ U.S. ___, 118 S.Ct. 1956.

2. Defendant has moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local rate regulation of cellular telephone carriers.

2. The gravamen of the complaint is that rates for four AirTouch cellular plans available to complainant are unreasonable in that they do not include an electronic billing format.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motion to dismiss the complaint for lack of subject matter jurisdiction should be granted.

5. Monies deposited by complainant pending resolution of this matter should be disbursed to defendant.

ORDER

IT IS ORDERED that:

1. The motion of AirTouch Cellular (AirTouch) to dismiss the complaint of Nova Cellular West, Inc., dba San Diego Wireless (Nova), for lack of subject matter jurisdiction is granted.

2. The complaint is dismissed.

3. The money deposited with the Commission by Nova in connection with this complaint, together with interest earned thereon, is to be disbursed to defendant AirTouch.

4. Case 98-02-036 is closed.

This order is effective today.

Dated September 3, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

Naylor Decl. 137

APPENDIX K

Decision 98-11-016 November 5, 1998
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California Wireless Resellers Association, Complainant, vs. Los Angeles Cellular Telephone Company and AirTouch Cellular, Defendants.	Case 98-06-055 (Filed June 26, 1998)

OPINION

1. Summary

California Wireless Resellers Association (California Wireless), representing wireless telephone resellers in the Los Angeles area, complains that Los Angeles Cellular Telephone Company (Los Angeles Cellular) and AirTouch Cellular (AirTouch) refuse to supply certain digital cellular service products on terms and at rates that would qualify as wholesale. Los Angeles Cellular and AirTouch move to dismiss on grounds that the Commission lacks jurisdiction to adjudge the lawfulness of rates charged by cellular telephone carriers. The motion is granted. The complaint is dismissed.

2. Nature of Complaint

California Wireless alleges that Los Angeles Cellular offers digital cellular service to retail customers, but that the conditions of service and rates offered to wireless resellers on some of these digital products "were not and are not wholesale rates and were not and are not offered to the resellers on a wholesale basis." (Complaint, pp. 2-3) Similarly, complainant alleges AirTouch offers its digital service on terms and at rates

that do not constitute reasonable wholesale offerings to resellers.

California Wireless asks this Commission to require defendants to provide digital service to wireless resellers at reasonable wholesale rates, and to require defendants to refund to resellers the difference between the rates actually charged and reasonable wholesale rates.

Los Angeles Cellular and AirTouch deny that they have failed to offer their digital services to reseller customers. They admit that certain contract terms and price discounts are offered on some of their retail plans but not on others, but they deny that this is unlawful. They state that resellers may purchase service under these alternative plans, but that they must accept the terms, conditions and service limitations of the plans.

3. Procedural History

This case was filed on June 26, 1998. Notice of the filing appeared in the Commission's Daily Calendar on July 14, 1998. On July 21, 1998, defendants were instructed to answer the complaint within 30 days. The instructions, copies of which were served on complainant, assigned the matter to Commissioner Duque and Administrative Law Judge Walker and categorized the case as an adjudicatory proceeding. Because we have decided to grant the motions to dismiss, no scoping memo is necessary, nor is a hearing required. As noted in the instructions to answer, a hearing is not required where the matter "is otherwise resolved by the parties," i.e., through pleadings addressing the motion to dismiss. The categorization of this matter as adjudicatory has not been contested by the parties.

4. Motions to Dismiss

Los Angeles Cellular and AirTouch on August 26, 1998, filed motions to dismiss the complaint on grounds that this Commission lacks jurisdiction to require defendants to offer particular rates, wholesale or otherwise, for the services

purchased by resellers.[1] California Wireless responded to the motions on September 15, 1998, arguing that this Commission may regulate terms and conditions of wireless service, and that the obligation to provide wholesale service at wholesale rates is a term and condition of cellular service. For the reasons set forth below, we agree that the Commission is without jurisdiction to address the rate practices alleged in this complaint, and that such enforcement must be left instead to the Federal Communications Commission (FCC) and to the federal courts.

5. Ratemaking Preemption

In recognition of the rapid growth of the wireless telecommunications services industry, Congress in 1993 amended the Communications Act of 1934, 47 U.S.C. §§151 et seq., as amended, to provide a uniform federal regulatory framework for all commercial mobile radio services.[2] Pursuant to its stated goals of regulatory uniformity and deregulation of the industry, Congress amended Section 332 of the Act to provide:

> "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a state regulating the other terms and conditions of commercial mobile services." (47 U.S.C.A. § 332(c)(3)(A).)

---

[1] AirTouch also moves to dismiss on the basis that complainants has failed to state a cause of action for which relief can be granted. Because we dismiss the complaint on jurisdictional grounds, we do not reach this other ground for dismissal.

[2] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L.No. 103-66, 107 Stat. 312, 387-97 (1993).

On August 8, 1994, as authorized by the Act, the Commission filed a petition with the FCC to continue the Commission's jurisdiction over the rates of cellular carriers for an 18-month period. On May 19, 1995, the FCC released its report and order denying the petition and, on June 8, 1995, the Commission announced that it would not appeal the FCC's denial.[3]

Consequently, this Commission lacks jurisdiction to hear complaints regarding the lawfulness of rates charged by cellular carriers. As the Commission has concluded with respect to cellular and other commercial mobile service carriers, "we will not entertain disputes regarding the level or reasonableness of any rate."[4]

California Wireless argues that the gravamen of its complaint is the obligation of facilities-based cellular providers to make their services available to resellers on a wholesale basis. It argues that the Commission is not precluded from regulating terms and conditions that may relate to rates, and that an order requiring wholesale terms for all defendants' services can be made without setting particular dollar amounts for rates. California Wireless does not explain, however, how wholesale rates can be required without establishing those rates.

---

[3] On June 22, 1995, the Cellular Resellers Association sought reconsideration of the FCC's denial. The FCC denied the petition for reconsideration in an order issued on August 8, 1995.

[4] *Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications*, D.96-12-071, at 23 (December 20, 1996). A number of judicial authorities support this view. *See In re Comcast Cellular Telecom Litigation* (E.D.Pa. 1996) 949 F.Supp. 1193, 1203-1204 ("All state regulation of the rates charged by CMRS providers is explicitly preempted by the language of the Act."); *Lee, et al. v. Contel Cellular of the South* (S.D.Ala. 1996) 1996 U.S.Dist. LEXIS 19636 (Communications Act preempts plaintiff's breach of contract claim challenging rounding practices in calculating cellular charges.)

In the recent case of *Nova Cellular v. AirTouch Cellular*, D.98-09-037 (September 3, 1998), the Commission dismissed a similar complaint for lack of jurisdiction. There, complainant argued that while defendant's rate plans were available on a resale basis to complainant, wholesale rates charged for some of the plans did not reflect certain cost savings realized by the defendant. Complainant described the action as a billing dispute and sought a Commission order requiring defendant to charge wholesale rates that recognized the alleged cost savings. The Commission in its decision recognized that, however labeled, complainant's demand inevitably would involve the Commission in "ratemaking for cellular telephone services, an activity in which the Commission has been preempted." (*Id.*, slip op. at 5-6.)

Similarly here, California Wireless does not contend that its members are barred from subscribing to service under any of the plans offered by defendants. Instead, it contends that defendants rates are unreasonable when applied to resellers, and it asks the Commission to impose a "reasonable margin." The type of margin that complainant would have us adopt is undeniably cost-based. This would entangle the Commission in the kind of ratemaking activity that we found in *Nova Cellular* has been preempted.

While we agree that the Commission retains authority to handle consumer complaints in matters of cellular nonrate terms and conditions of service,[5] the Commission does not have jurisdiction to establish wholesale rates for service plans offered by defendants and to other refunds to California Wireless for

---

[5] *See* D.96-12-071, Conclusion of Law 10: "The Commission shall continue to monitor the structure, conduct and performance of CMRS carriers, and to handle CMRS consumer complaints, ensuring that facilities-based carriers not restrict in any manner, by way of nonrate terms and conditions, the ability of resellers to purchase or resell cellular or other telecommunications services to the public."

amounts paid in excess of those rates. Since we lack jurisdiction to consider the subject matter in question, the complaint must be dismissed.

Findings of Fact

1. Complainant alleges that defendants unlawfully fail to make certain services available at wholesale rates and terms.

2. Defendants have moved to dismiss the complaint for lack of jurisdiction.

Conclusions of Law

1. Congress in 1993 amended the Communications Act of 1934 to preempt state and local regulation of the rates charged by cellular telephone carriers.

2. The gravamen of the complaint is that rates made available to resellers for certain cellular service products are not wholesale rates.

3. The Commission has been preempted from prescribing rates for cellular telephone service.

4. The motions to dismiss the complaint for lack of subject matter jurisdiction should be granted.

ORDER

IT IS ORDERED that:

1. The motions of Los Angeles Cellular Telephone Company and AirTouch Cellular to dismiss the complaint of the California Wireless Resellers Association for lack of subject matter jurisdiction is granted.
2. The complaint is dismissed.
3. Case 98-06-055 is closed.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

2-9

GIBSON, DUNN & CRUTCHER LLP
STEVEN E. SLETTEN, SBN 107571
RICHARD D. GLUCK, SBN 151675
CHRISTINE NAYLOR, SBN 172277
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000

Attorneys for Defendants
Los Angeles Cellular Telephone Company and
AT&T Wireless Services, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

MARCIA SPIELHOLZ, on behalf of herself and all others similarly situated; DEBRA PETCOVE, et al.

Plaintiffs,

v.

LOS ANGELES CELLULAR TELEPHONE COMPANY, a partnership, et al.

Defendants.

CASE NO. BC186787

Assigned to the Hon. Wendell Mortimer, Jr.

DEFENDANTS LOS ANGELES CELLULAR AND AT&T WIRELESS SERVICES' REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE IMPROPER CLAIMS FOR RELIEF IN SECOND AMENDED COMPLAINT

Date: February 11, 1999
Time: 9:00 a.m.
Dept: 56

Action Filed: February 27, 1998
Trial Date: None set

Exhibit 2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I.

INTRODUCTION

Plaintiffs allege in this action that Los Angeles Cellular Telephone Company ("L.A. Cellular") falsely advertises the quality and geographic scope of its cellular telephone service. As a result, plaintiffs contend, L.A. Cellular's customers pay too much for the cellular service they receive. Plaintiffs seek to recover the difference between what L.A. Cellular charges for its service and what plaintiffs believe L.A. Cellular should charge. As pleaded, plaintiffs' claims ask this Court to engage in judicial rate-making as it must decide what is a reasonable rate for the service that L.A. Cellular's subscribers receive. Yet Congress has expressed clearly its intent to preempt all state regulation — including judicial regulation — of the rates that cellular service providers charge their customers. The narrow question that this motion to strike presents, then, is whether plaintiffs properly can assert a claim for relief that necessarily will enmesh this Court in the type of judicial regulation of cellular telephone rates that Congress has proscribed. The answer to that question is no, and L.A. Cellular's motion should be granted.

II.

THIS COURT HAS NOT ALREADY REJECTED L.A. CELLULAR'S PREEMPTION ARGUMENT

Plaintiffs devote much of their opposition urging this Court not to consider the merits of L.A. Cellular's motion. That is not surprising. For when all is said and done, plaintiffs simply must acknowledge that the relief they seek, if granted, will require this Court to engage in the type of judicial rate-making that Congress forbade when it passed the Federal Communications Act.

L.A. Cellular argued in its previous demurrer that plaintiffs' claims were preempted in their entirety. This Court sustained that demurrer, albeit with leave to amend, noting that plaintiffs' first amended complaint contained allegations that raised issues of federal preemption. Plaintiffs have attempted to re-plead their claims in a way that avoids preemption. Thus, plaintiffs have eliminated most of the overt allegations that touched on

subjects where Congress has preempted state regulation. For example, one allegation that plaintiffs have now omitted is their claim that L.A. Cellular unfairly charges customers who use hand-held cellular telephones rates that are too high for the allegedly diminished service they receive. Plaintiffs have recognized that those claims are preempted because they interfere with the FCC's exclusive authority to regulate rates that cellular providers like L.A. Cellular charges their customers. In dropping those claims, plaintiffs implicitly have admitted (as they must) that claims challenging the rates that L.A. Cellular charges its customers are preempted. Plaintiffs did not, however, go far enough in narrowing their claims to avoid the same preemption issue at this pleading stage.[1]

While plaintiffs have essentially eliminated overt challenges to the rates that L.A. Cellular charges its customers, plaintiffs' claims continue to revolve around federally regulated "coverage area" requirements and seek as a remedy in this action disgorgement of profits that L.A. Cellular earned. In doing so, plaintiffs ask this Court to determine what rate customers should have paid for the allegedly diminished level of service that they and other subscribers received. That claim constitutes judicial regulation of rates no less clearly than did plaintiffs' now-dropped explicit claim that L.A. Cellular was charging customers with hand held cellular telephones too much for the service they received. It is plaintiffs' improper and preempted claim for monetary relief that L.A. Cellular seeks to strike by this motion.

This Court did not, as plaintiffs curiously argue, reject L.A. Cellular preemption defense in ruling on the previous demurrer. To the contrary, the Court **sustained** that

---

[1] It should be noted that this case is at the pleading stage only and, with the exceptions noted in its motion to strike, L.A. Cellular does not at this time seek to dismiss plaintiffs' claims in their entirety on preemption grounds. Plaintiffs' claims may nevertheless be preempted or otherwise lack merit and subject to future legal review (*e.g.*, by way of motion for summary judgment), L.A. Cellular reserves all rights it has to pursue such review in the future. The gravamen of plaintiffs' case still remains as an attack on the reasonableness of L.A. Cellular's rates, and this is an area that is outside the jurisdiction of this court.

demurrer, noting that some elements of plaintiffs' claims raised preemption issues. Thus, it frankly is hard to understand how L.A. Cellular's motion to strike conceivably could be considered an improper "successive demurer" or "second bite at the apple." Instead, this motion simply is the logical (and proper) response to plaintiffs' failure to eliminate all claims and requests for relief whose effect is impermissibly to regulate L.A. Cellular's cellular service rates.

III.

CONGRESS HAS UNAMBIGUOUSLY PREEMPTED ALL STATE REGULATION OF THE RATES THAT CELLULAR PROVIDERS LIKE L.A. CELLULAR CHARGE THEIR CUSTOMERS

Congress could not have more clearly expressed its intent to displace **all** state or local regulation of rates charged for cellular service when it enacted the Federal Communications Act. That Act expressly provides that no state or local government shall have **any** authority to regulate the rates charged by cellular telephone services providers. 47 U.S.C. § 332(c)(3)(A). Despite this clear and unequivocal proscription, plaintiffs nonetheless ask this Court effectively to regulate L.A. Cellular's rates. To be sure, plaintiffs carefully try to mask their claims, arguing at every turn that they seek simply a remedy for L.A. Cellular's alleged false advertising. Conspicuously absent from plaintiffs' opposition, however, is any counter to L.A. Cellular's clear showing that the monetary relief that plaintiffs seek will, if granted, set and thus regulate the rates that L.A. Cellular charges its subscribers. Plaintiffs seek to force L.A. Cellular to disgorge the difference between the rates that L.A. Cellular charges its customers and the rates that plaintiffs believe L.A. Cellular should charge. In other words, plaintiffs expressly and unambiguously ask this Court to adjust L.A. Cellular's rates. The Federal Communications Act expressly prohibits this type of ad hoc judicial rate-making.

The Federal Communications Act preempts all state regulation of cellular-service rates regardless of whether such efforts stem from the state's legislative, executive, or judicial branch. 47 U.S.C. § 332. After all, a state law claim for damages is merely one form of state

regulation. *See San Diego Bldg. Trade Council v. Garmon, supra,* 359 U.S. at 247; *see also AT&T v. Central Office Telephone, Inc.*, 118 S. Ct. 1956, 1963 (1998) (noting that challenges to rates take many forms and go beyond actions that simply allege that the rate itself is unreasonable). A state regulates cellular rates just as surely when its courts allow consumers to challenge cellular rates as it does when its regulatory agencies approve tariffs. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981) (holding that award of damages to natural gas producer based on difference between rate approved by federal agency and higher rate to which producer believed it was entitled under "favored nations" clause in contract constituted an impermissible retroactive rate increase barred by the filed-rate doctrine). Where Congress has committed regulatory authority over rates exclusively to a federal agency, the Constitution's Supremacy Clause does not permit such "rate regulation" by states. *Id.* At 581-82.

Plaintiffs seek a judicially determined rebate or refund of the allegedly excessive fees that plaintiffs and purported class members paid for the diminished level of service they contend they received. Indeed, plaintiffs explicitly seek recovery because, they allege, they "received substantially less service than that for which they contracted." Plaintiffs' Second Amended Complaint at ¶ 33. In determining whether and how much plaintiffs will recover, this Court necessarily will need to determine, first, whether L.A. Cellular's rates were reasonable given the quality of service provided. Second, if this Court were to determine that the rates were unreasonably high, it must then determine the reasonable rate that L.A. Cellular should have charged. It is hard to envision an exercise that would enmesh a court more fully in rate-setting or rate-regulation. Many of the cases on which plaintiffs rely in their opposition simply did not involve the kind of rate regulation that plaintiffs' claims will require this Court to engage in here. And, all of the cases upon which plaintiffs rely support the basic proposition advanced by L.A. Cellular here -- when a plaintiff does challenge the reasonableness of a cellular provider's rates, as do plaintiffs' claims for damages or restitution in this case, they are preempted.

The court in *Kellerman v. MCI Communications Corp.*, 493 N.E.2d 1045 (Ill. 1998),[2] expressly noted that plaintiffs' false advertising claims, which alleged that MCI had disseminated false and deceptive information about the costs of its long-distance telephone service, involved "neither the quality of defendant's service **nor the reasonableness and lawfulness of its rates.**" *Id.* at 1051 (emphasis added). Plaintiffs' reliance on *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541 (D.N.J. 1996),[3] is similarly misplaced. First, *DeCastro* was a removal case where the court considered the issue of complete preemption -- unlike this case which does not arise in the removal context and in which L.A. cellular does not make the claim of complete preemption of all claims. As the court in *DeCastro* specifically noted, plaintiffs' claims were not completely preempted and could not be removed to federal court because **they did not directly challenge the reasonableness of the rates themselves.** *Id.* at 552, 555.

Plaintiffs also cite the decision from the Washington State Supreme Court in *Tenore v. AT&T Wireless Services, Inc.*, No. 64930-8, 1998 Wash. Lexis 593 (September 10, 1998), a copy of which is attached as Exhibit 17 to their Appendix of Non-California Authorities, as support for their position here. *Tenore*, of course, has no precedential value here in California, and is on its face inconsistent with California law to the extent it permits a damages and/or restitution remedy to address misrepresentation claims concerning a cellular carrier's rates. *See Day v. AT&T Corp.*, 63 Cal. App. 4, 325 (1998). The court in *Tenore* concluded that plaintiffs were not attacking the "reasonableness of *AT&T's* practice of rounding up call charges" but instead only challenging an alleged "non-disclosure" of the practice. The court there then further concluded that resolution of those claims would not

---

[2] A copy of the *Kellerman* decision is attached as Exhibit 12 to Plaintiffs' Appendix of Non-California Authorities.

[3] A copy of the *DeCastro* decision is attached as Exhibit 6 to Plaintiffs' Appendix of Non-California Authorities.

enmesh the court in a rate-setting exercise, and thus the court claimed to avoid the preemption problem.[4] By contrast, in order to decide the plaintiffs' claims as they are pleaded in this case, however, it cannot legitimately be disputed that this Court will have to determine the reasonable rates for the service that plaintiffs and other subscribers **received**, compared with what plaintiffs claim L.A. Cellular represented its subscribers **would receive**. That inquiry logically will vary from subscriber to subscriber depending on the level of service that each subscriber received. By any standard, the Court here would have to perform the prohibited act of evaluating the reasonableness of L.A. Cellular's rates.

While Congress has allowed states to regulate other terms and conditions of cellular service, it unambiguously has prohibited **all** state regulation of cellular service **rates**. As a result, courts generally have routinely dismissed on preemption grounds cases where the plaintiff's claims would require the court to determine a reasonable rate or to become enmeshed in rate setting or regulation. *See, e.g., In re Comcast Cellular Telecom. Litigation*, 949 F. Supp. 1193, 1201 (E.D. Pa. 1996); *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 340 (1998); *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121 (S.D.N.Y. 1992) (finding that damages award would require determination of reasonable rate, and thus was preempted). As the court in *In re Comcast* noted, a claim for monetary relief, no matter how cleverly labeled, that would require the court to engage in regulating cellular rates is preempted:

> An examination of the Plaintiffs' complaint **and the remedies they seek** demonstrates that the driving force behind their allegations is a desire to impose restrictions not only upon the way in which Comcast advertises its rates but also upon the rates which Comcast may charge for mobile telephone services. . . . **The remedies they seek would require a state court to engage in regulation of the rates charged by a [cellular service] provider, something it is explicitly prohibited from doing.**

---

[4] The *Tenore* court in fact erred in reaching this conclusion, as the plaintiffs' claim for damages there was also an attempt to "re-set" the rates charged by returning to the subscriber some monetary amount measured by the rate paid as compared with the rate the plaintiffs claimed they should have paid absent the alleged improper "rounding up." A Petition for Writ of Certiorari has been filed with the United States Supreme Court in the *Tenore* matter. See Request for Judicial Notice filed concurrently herewith.

949 F. Supp. at 1201 (emphasis added).

Although *Day* and *Wegoland* were "filed-rate" cases, and cellular carriers in California no longer are required to "file" rates with the PUC, their logic leads to the same conclusion. As the court in *Day* correctly recognized, if an award of monetary relief under Business & Professions Code sections 17200 and 17500 for failure to make disclosures in cellular telephone advertising "would enmesh the court in the rate-setting process," a plaintiff may not seek such an award. *Day*, 63 Cal. App. 4th at 337. That is precisely the case here. Consequently, plaintiffs' monetary claims must be stricken.

IV.

THE COMMUNICATIONS ACT'S "SAVINGS CLAUSE" DOES NOT SAVE PLAINTIFFS' PREEMPTED CLAIMS FOR MONETARY RELIEF

Plaintiffs once again resort to the Communications Act's Savings Clause to try to save their preempted claims. Plaintiffs argue anew that federal preemption does not extend to consumer protection claims like those they are asserting here. Plaintiffs are wrong. The Communications Act preempts all claims, even consumer protection claims, that would effectively result in the regulation of cellular telephone service rates. *See generally AT&T v. Central Office Telephone, Inc., supra,* 118 S. Ct. at 1963 (noting that the Act's Savings Clause preserves only those rights that are not inconsistent with federal requirements, and "cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the [Communications] Act."); *Day*, 63 Cal. App. 4th at 337-38; *In re Comcast,* 949 F. Supp. at 1205 (noting that the Savings Clause cannot be read to destroy the Act's preemption clause, and that the Savings Clause could, therefore, be read to preserve state law claims that do not conflict with preemption of state regulation). That is the case here. As shown above, while plaintiffs may be able to pursue a claim for injunctive relief to address L.A. Cellular's advertising policies and practices, plaintiffs may not seek monetary relief (whether disgorgement, restitution, damages, or otherwise) measured by the difference in what the rates are as compared to what

they should have been because to do so would force this court to engage in judicial rate-making or regulation. Plaintiffs' claims for monetary relief are, therefore, preempted and must be stricken.

V.

CONCLUSION

Plaintiffs have struggled to craft a complaint that is not subject to attack on preemption grounds. Plaintiffs have failed to do so. While plaintiffs have eliminated overt allegations that challenge the rates that L.A. Cellular charges its customers, the effect of their claim for monetary relief does exactly that. Because plaintiffs' monetary relief claims seek to regulate L.A. Cellular's rates no less than their overt challenge to L.A. Cellular's rates did, their damage claims are no less preempted. And because they are preempted, they must be stricken.

DATED: February 9, 1998

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
STEVEN E. SLETTEN
RICHARD D. GLUCK
CHRISTINE NAYLOR

Steven E. Sletten

Attorneys for Defendants
Los Angeles Cellular Telephone Company and
AT&T Wireless Services, Inc.

OA990340.275/15+